

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF ARIZONA

3 Arizona Department of Economic)
4 Security, an Arizona State)
5 agency,)
6)
7 Plaintiff,) 4:23-cv-00250-LCK
8)
9 vs.)
10)
11) Tucson, Arizona
12 Christine Wormuth; Secretary) August 29, 2023
13 of the Army, in her official) 1:38 p.m.
14 capacity,)
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_____ Defendant. _____

12 TRANSCRIPT OF PROCEEDINGS
13 MOTION HEARING

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15
16 BEFORE THE HONORABLE LYNNETTE C. KIMMINS
17 UNITED STATES MAGISTRATE JUDGE
18 405 WEST CONGRESS STREET
19 TUCSON, ARIZONA 85701
20

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P R O C E E D I N G S

(Call to order of court, 1:38 p.m.)

CLERK: Court is now in session. Calling civil matter 23-250, Arizona Department of Economic Security versus Christine Wormuth on for an evidentiary hearing.

Would counsel please state your appearances for the record?

MR. FREEMAN: Afternoon, Your Honor. This is Andrew Freeman for Arizona Department of Economic Security. With me today is Neel Lalchandani here in my office and also on the line, Randy Aoyama, our local counsel.

THE COURT: Thank you. Good afternoon, everyone.

MS. LETZKUS: Good afternoon, Your Honor. This is Sarah Letzkus for the defendant and with me in my office today is my co-counsel, Cole Hernandez.

THE COURT: Thank you. Good afternoon, as well.

And so the parties are aware, we also have a separate telephone line for members of the public that wanted to listen in. They'll be muted so we shouldn't hear any of them but they do have the ability to go ahead and listen to the arguments.

This is the time set for closing arguments on the motion for preliminary injunction and, Mr. Freeman, are you going to be the one arguing for the plaintiff?

MR. FREEMAN: I will, Your Honor.

THE COURT: Okay. So whenever you're ready to go, go ahead.

1 MR. FREEMAN: Thank you.

2 Good afternoon. On behalf of the Arizona Department of
3 Economic Security, thank you for the opportunity to present our
4 closing argument and to address the court's questions.

5 I'd like to start by addressing the posture of this case
6 and some of the relevant legal issues. I'll then address the
7 merits, why DES is likely to prevail in its Randolph-Sheppard
8 arbitration against the Army. And, in the course of that
9 discussion, I'll discuss each of the court's questions.
10 Finally, I'll return to the irreparable harm to ADES and its
11 vendors, the lack of harm to the Army, and the public interest.
12 And of course at any time in the presentation, Your Honor, I'd
13 welcome any additional questions the court might have.

14 THE COURT: Thank you. I appreciate that.

15 MR. FREEMAN: Let me start with the preliminary
16 injunction standard. As the court knows, to obtain a
17 preliminary injunction, a plaintiff must establish, first, that
18 it is likely to succeed on the merits; second, that it will
19 suffer irreparable harm in the absence of preliminary relief;
20 third, that the balance of the equity supports an injunction;
21 and, fourth, that an injunction is in the public interest.

22 I'd like to direct the court's attention to a Ninth Circuit
23 decision from last year, *hiQ*, spelled lowercase h-i, upper case
24 Q, *Labs versus LinkedIn*, 31 F.4, 1180, which the Army cited on
25 the last page of its brief. In that case, Your Honor, the

1 Ninth Circuit affirmed the district court, beginning its
2 analysis with the balance of the equities and instructed,
3 quote, when the balance of hardship tips sharply in the
4 plaintiff's favor, the plaintiff need demonstrate only serious
5 questions going to the merits, close quote, in order to obtain
6 that preliminary injunction. Again, that's 31 F.4 at 1188 and
7 that same analysis is expanded upon at page 1191.

8 The posture of this case is the same as in the *hiQ Labs*.
9 The Fort Huachuca food services contract is the lifeblood of
10 the state's Randolph-Sheppard program. Absent an injunction,
11 DES's blind vendor program will be decimated and Scott Weber,
12 its blind vendor, along with the program's other 20 blind
13 vendors and their families will suffer immediate, concrete, and
14 irreparable harm. By contrast, granting an injunction will not
15 harm the Army at all. It and its soldiers will continue to
16 receive the same high-quality service it has received for the
17 past two decades.

18 Because the balance of the harm tips so strongly in its
19 favor, DES need only raise serious questions going to the
20 merits of its claim to obtain a preliminary injunction. It has
21 got at least that and has gone farther than necessary and
22 demonstrated that it's likely to succeed on the merits.

23 In a minute or two I will address why DES is likely to
24 succeed in the arbitration given that the Army refused to place
25 DES's proposal in the competitive range despite the fact that

1 it could have been made acceptable through meaningful
2 discussions. That is all that is required, that is what is
3 required by the Randolph-Sheppard Act and its regulations for
4 placement in the competitive range.

5 First, I want to highlight the statutory and regulatory
6 scheme that applies here. In 1974 Congress amended the
7 Randolph-Sheppard Act to require the Secretary of Education to,
8 quote, prescribe regulations to establish a priority for the
9 operation of cafeterias on federal properties by blind vendors
10 when such operation can be provided at a reasonable cost with
11 food of high-quality comparable to that currently provided to
12 employees. That's 20 USC Section 107d-3(e), 107d-3(e). Again,
13 the priority applies when the operation can be provided at a
14 reasonable cost with food of high-quality comparable to that
15 currently provided to employees.

16 That's precisely what we have here. There's no real doubt
17 that DES and its blind vendor can provide food of high-quality
18 comparable to what they're currently providing. And here price
19 is not an issue raised by the Army.

20 In 1977, the Department of Education promulgated the
21 regulations that Congress had charged it to promulgate at
22 34 CFR Section 395.33, colloquially referred to as the
23 cafeteria regulations. In 395.33(a), the Department repeated
24 the Act's instruction as to when the priority should be
25 granted. And it added that, quote, such operation shall be

1 expected to provide maximum employment opportunities to blind
2 vendors to the greatest extent possible, close quote.

3 In the next subsection, 395.33(b), the Department of
4 Education established a procedure that entitles the state
5 licensing agency to a priority to operate a cafeteria on
6 federal property if the SLA's proposal, quote, is judged to be
7 within a competitive range, close quote. And, quote, has a
8 reasonable chance of being selected for final award, close
9 quote.

10 In 1977, when that regulation was adopted, federal property
11 managers, including the Army, were required to place the SLA's
12 proposal in the competitive range if it could then be made
13 acceptable through meaningful discussions. That was the
14 meaning of the phrase "competitive range" in 1977. We'll come
15 back to that in a minute.

16 With respect to the first preliminary injunction factor, a
17 likelihood of success, we submit that the most straightforward
18 way to resolve this motion is by ruling that DES is likely to
19 prevail or at the least has raised a serious question on the
20 second violation of the Randolph-Sheppard Act alleged in its
21 arbitration complaint. I'm also going to discuss why DES
22 prevails on the first violation but the court need not even
23 reach that issue. That's because, as to the second issue, even
24 assuming that DES's proposal was technically deficient, the
25 Randolph-Sheppard Act and regulations, still required the Army

1 to place that proposal in the competitive range since any
2 deficiencies could have been remedied through a meaningful
3 discussion.

4 The Army's main defense that it was precluded from
5 conducting meaningful discussions before the setting of the
6 competitive range simply misses the point. DES is not saying
7 that the Army had to have discussions before setting the
8 competitive range. Rather, the Randolph-Sheppard Act and
9 regulations require the Army to first place DES's proposal in
10 the competitive range, after which the parties could have
11 entered and should have entered into meaningful discussions.

12 At the outset, as we mentioned, the 1977 definition of
13 "competitive range" applies in this case. Basic rules of
14 statutory interpretation mandate that the Department of
15 Education's 1977 regulation, which has not been revised since
16 then, be interpreted in light of what its terms meant at the
17 time it was adopted. For example, after citing extensive case
18 law, the South Carolina arbitration panel, whose decision we
19 provided at ECF 22-20, held, quote, we must interpret the
20 Randolph-Sheppard regulations adopted in 1977 by reference to
21 how the term "competitive range" was used at the time the
22 regulation was drafted, close quote. Again, that's ECF 22-20
23 at 11.

24 Similarly, in considering a slightly different issue, a
25 Georgia federal court looked to the understanding of the

1 cafeteria regulation at the time it was drafted, and that's
2 398 F.Supp 3d at 1349, and this issue is discussed in our reply
3 brief on ECF 32 at page 9.

4 Moreover, as we discussed at the hearing, the 1977
5 definition of "competitive range" is reflected in the
6 Department of Education's handbook. Numerous arbitration
7 panels have relied on that handbook, including the Utah
8 decision, which is ECF 22-24 at 10, the Oklahoma decision,
9 ECF 22-25 at 44, and the Colorado decision, ECF 22-22 at 15.

10 Each of these discussions -- these decisions and all of
11 these decisions demonstrate that DES is likely to prevail
12 before its arbitration panel on the issue that the 1977
13 definition of "competitive range" and the interpretation of
14 that definition in the Department of Education's handbook apply
15 here and, therefore, entitle DES to be placed in the
16 competitive range and then conduct meaningful discussions with
17 the Army which would have led to a final decision that it was
18 appropriately in the competitive range.

19 Moreover, to the extent that the Army is arguing that the
20 Federal Acquisition Regulations somehow trump the
21 Randolph-Sheppard Act, it's simply mistaken. Because the
22 Randolph-Sheppard cafeteria regulation is more specific in its
23 application to this case than the general FAR, numerous courts
24 and arbitration panels have held that the more specific
25 regulation governs over the more general one. Among those

1 cases is the Michigan case we cited in -- and, again, we
2 discuss that issue at page 9 of our reply.

3 I'd like to turn now to the court's first question, which
4 was, quote, if the court were to utilize the interpretation of
5 "competitive range" from 1977 and/or the DOE handbook, should
6 that apply to all proposals in response to a solicitation or
7 only to a proposal by an SLA?

8 The answer is that as of now, in 2023, the 1977 definition
9 of "competitive range" does not apply to all proposals but
10 continues to apply to state licensing agencies' proposals. And
11 that's true for several reasons. First, the statutory priority
12 is granted to SLAs, and SLAs alone. The requirement to place
13 the state licensing agency's bid in the competitive range if it
14 can be made acceptable is one application of that
15 Randolph-Sheppard priority which, again, applies just to the
16 SLA.

17 As the Colorado arbitration panel held last year, quote,
18 the use of the more restrictive definition of competition in
19 the current FAR does not implement the Randolph-Sheppard
20 priority. That's ECF 22-22 at page 14.

21 The Department of Education's interpretation of its own
22 regulation, which is entitled to deference as we explain in our
23 motion, ECF 22 at page 21, footnote five, supports this
24 understanding. Starting on page 35 of its handbook, the
25 Department of Education explains how the, quote, priority

1 applies before, during, and after the setting of the
2 competitive range. It confirms that one way the priority
3 applies is by including the SLA's proposal in the competitive
4 range if it can be made acceptable through meaningful
5 discussions.

6 Another way the priority applies is when selecting the
7 contract. As page 37 of the handbook explains, quote, the
8 SLA's proposal does not have to be the best overall proposal
9 for them to be awarded the contract, close quote. That is not
10 true for other offerors. I don't think the Army disputes that.
11 The SLA's proposal does not have to be the low bidder, so the
12 Army acknowledges that the SLA's proposal can be treated
13 differently than any other proposal. What the Army misses is
14 that same difference also governs with respect to the initial
15 inclusion in the competitive range.

16 The 1977 definition is also consistent with the text and
17 purpose of the Randolph-Sheppard Act and regulations. That act
18 is a broad remedial statute, as discussed in the Ninth
19 Circuit's decision last year in the *Hawaii* case, 46 F.4th at
20 1148 at page 1156.

21 When the 1977 definition of "competitive range" was first
22 adopted, it did apply to all offerors. But in 1984, the
23 Department of Defense and other entities adopted the Federal
24 Acquisition Regulations, thus DOD chose to change the
25 definition of "competitive range". It was entitled to do that

1 for all other offerors, it was not entitled to do that with
2 respect to state licensing agencies. The Department of Defense
3 can change contracting rules generally but it does not have
4 authority to alter the Randolph-Sheppard Act or its 1977
5 regulation. That power is reserved for Congress and explicitly
6 by Congress reserved to the Department of Education.

7 Thus, doubling back to the court's question, the 1977
8 definition currently applies solely to SLAs. To be clear, a
9 federal agency can initially evaluate all proposals it receives
10 under the same criteria but after that evaluation, if an SLA's
11 proposal can be made acceptable through meaningful discussions,
12 then that proposal must be included in the competitive range.
13 And then the federal property manager, the Army in this case,
14 moves on to step two, where even it acknowledges it can then
15 conduct discussions with the offeror.

16 So, let me turn -- I want to apply this 1977 definition of
17 "competitive range" to the facts of this case and I'm going to
18 skip to the court's fourth question and then come back to
19 questions two and three, if that's okay.

20 THE COURT: That's fine.

21 MR. FREEMAN: So the court's fourth question is the
22 appropriate one when applying the 1977 definition. Was ADES's
23 technical proposal so technically inferior that it could not
24 have been made acceptable through meaningful discussions? And
25 the answer to that question is a resounding no.

1 In 1977, the term "competitive range" meant that a
2 proposal, quote, must be considered to be within a competitive
3 range so as to -- so as to require negotiation unless it is so
4 technically inferior or out of line with regard to price that
5 meaningful discussions are precluded, close quote. That's
6 again from the South Carolina arbitration decision which is
7 ECF 22-20 at page 11.

8 As the Department of Education handbook puts it, there
9 needs only be, quote, a possibility, close quote, that a
10 proposal can be made acceptable through meaningful discussions.
11 And that's the DOE handbook, it was Plaintiff's Exhibit 18 to
12 our initial motion and then was Exhibit -- ECF 22-21 at
13 page 36. That possibility standard is a low bar to meet and
14 one that ADES easily crossed.

15 Here, it is evident that this possibility existed. Indeed,
16 there was a high probability that any of the supposed
17 deficiencies in DES's proposal could have been easily fixed.
18 First, the Army complained that the DFAs, dining facility
19 attendants, and FSSs, were understaffed. And Mr. Froehlich
20 testified the Army believed that DES's proposal was short by
21 just two to three people.

22 The easy remedy would have been to provide those two to
23 three people which DES and Mr. Weber would have been glad to
24 do, in -- yeah, it would have been short of meaningful
25 discussions. If the Army had simply said, "We want two or

1 three more DFAs or FSSs," they would have been provided.
2 Alternatively, those discussions might have convinced the Army
3 that the current staffing which does not include those two or
4 three people but instead covers their tasks by cross-training,
5 that that might have sufficed and saved the Army money. Either
6 one of those would have, through meaningful discussions, led to
7 the satisfaction -- to the provision of staffing that satisfied
8 the Army.

9 Second, the Army complained that there were not enough
10 cashiers. Again, that issue could have been remedied by DES
11 providing more cashiers if that was what the Army wanted or
12 again by convincing the Army that the current staffing
13 suffices.

14 On the same sort of the subissue that was raised later by
15 the Army about the cash boxes and whether they were adequately
16 secured, I submit, first of all, that wasn't even part of the
17 initial disqualification.

18 Secondly, to the extent that it applies, and we submit that
19 it doesn't, again, that could have been remedied either by
20 providing additional cashiers or other people to check out the
21 cash boxes or, again, by convincing the Army that the current
22 staffing provided. Again, that was the sort of difference that
23 could have easily been remedied by meaningful discussions.

24 Third, and finally, with respect to the Army's complaints,
25 the Army alleged or the Army pointed out that while DES

1 provided the pricing for two scenarios at Thunderbird, these
2 scenarios that don't currently occur, DES did not fill out the
3 staffing matrix for those two scenarios. That, too, Your
4 Honor, could have been easily fixed during meaningful
5 discussions. The Army could have asked for the staffing of
6 those two matrices. DES had already determined that staffing
7 to come up with the pricing, and DES would have said: Sure.
8 Here's the staffing.

9 Indeed, Ms. Mackey, in her March 6th letter offered to do
10 exactly that. That's Exhibit 22-13 at page 2. She offered it.
11 That offer was not even communicated to Mr. Froehlich and, in
12 any case, the Army simply declined to take her up on that
13 offer. But, again, the Randolph-Sheppard Act required the Army
14 to take her up on that offer.

15 The Randolph-Sheppard Act and its regulations required the
16 Army to place DES's proposal in the competitive range, and then
17 engage -- because it could then have been made acceptable
18 through meaningful discussions. Once it was in the competitive
19 range, again, the Army admits it could have asked for
20 clarification and could have, could have asked DES for that
21 staffing and Ms. Mackey would have, as she had offered,
22 provided that staffing.

23 Arbitration panels have found violations of the
24 Randolph-Sheppard Act under similar circumstances. Like this
25 case, in the South Carolina arbitration, SLA's proposal was

1 allegedly, quote, missing certain components. As noted in the
2 dissent in that case, the proposal did not include staffing for
3 the fourth meal of the day necessary for Marines in training,
4 did not include a menu for required events, or a nutritional
5 content as required by that solicitation. So those specifics
6 are included at ECF 22-20 at pages 25 and 33.

7 The majority of that panel, however, found that any items,
8 quote, missing from the South Carolina proposal could have been
9 easily resolved in meaningful discussions and, further, that,
10 quote, minor mistakes in the proposal and questions regarding
11 staffing levels could have been easily rectified had the Marine
12 Corps engaged in meaningful discussions with the South Carolina
13 SLA. Again, that's ECF 22-20 at page 4. We discussed that in
14 our initial brief, ECF 22 at page 23.

15 The evidence that DES's proposal could have been made
16 acceptable, let alone could possibly have been made acceptable
17 is overwhelming. As Mr. Weber expressly testified, if the Army
18 had wanted more staff, he would have gladly supplied that
19 additional staff. He testified at the hearing that if the Army
20 asked for more staffing, he would, quote, do what they asked.
21 It's their facility and their soldiers; we take care of them,
22 close quote. That's the transcript from day one at page 84,
23 lines 16 through 25.

24 Additionally, the history of cooperation and -- between DES
25 and the Army is additional evidence that meaningful discussions

1 could have made DES's proposal acceptable and, again, DES in
2 Ms. Mackey's March letter offered to provide the staffing for
3 the two scenarios at Thunderbird. Again, any deficiencies here
4 were easily fixable.

5 In Mr. Vicory's exalted (phonetic) knowledge, the Army has
6 sometimes engaged in, quote, extensive discussions with
7 offerors at step two. That was the testimony in the day two
8 transcript at page 62, lines 12 to 15. Here the discussions
9 and negotiations between DES and the Army would not have needed
10 to be extensive. The Army could have simply said, "We want
11 this additional staffing information" and DES would have
12 obliged.

13 The Army, Your Honor, has not rebutted or even attempted to
14 rebut this evidence. In its response and at the hearing, the
15 Army refused to argue under the proper 1977 standard. The Army
16 has not disputed that it was possible for DES's proposal to be
17 made acceptable through meaningful discussions. Thus, the
18 court should find that the Army violated the Randolph-Sheppard
19 Act by failing to include DES's proposal in the competitive
20 range given that any deficiencies in that proposal could have
21 been remedied through meaningful discussions.

22 Turning to the court's third question, that is, as Your
23 Honor wrote, the Army engaged in written discussions with ADES
24 after excluding it from the competitive range, and the
25 contracting officer testified that he would have included the

1 SLA in the competitive range if the Army determined its
2 technical evaluation had been inaccurate. Could these
3 interactions qualify as, quote, meaningful discussions? And
4 the answer to that is simply no.

5 The question merges two distinct issues together. I want
6 to tease those issues apart. The first allegation, the first
7 violation that DES has alleged is that the Army improperly
8 evaluated DES's proposal in the first instance. The second
9 alleged violation, the one that concerns meaningful
10 discussions, is distinct from that first violation. For the
11 second violation, the question is: Excepting those
12 deficiencies, could the proposal have been made acceptable and
13 those deficiencies remedied through meaningful discussions?
14 But the Army, Your Honor, in it's quote, unquote, reevaluation
15 of DES's proposal, limited itself to the first issue, whether
16 DES's proposal was technically acceptable. The Army never
17 considered whether the proposal could be made acceptable
18 through meaningful discussions.

19 Again, for example, Mr. Vicory never even communicated to
20 Mr. Froehlich Ms. Mackey's offer to clarify the cross-training
21 nor her offer to provide the staffing matrices for the two
22 scenarios at Thunderbird. There simply were no meaningful
23 discussions between the parties.

24 The Army did not engage in any discussions with DES or
25 allow any revisions to DES's proposal. The parties simply

1 exchanged two letters. The Army did not take DES up on its
2 offer to provide staffing for the two -- for those two
3 scenarios, the Army did not in any way allow DES to clarify its
4 proposal or to engage in a discussion, a back and forth with
5 the Army in which DES either could have explained why its
6 proposed staffing was satisfactory or listened to the Army and
7 made slight modifications to its proposal to add additional
8 staff to meet the Army's, what the Army thought were its
9 requirements.

10 Regardless, the proper inquiry here is not whether the Army
11 in fact engaged in meaningful discussions with DES in April
12 2023 at the end of that process. The Army violated the
13 Randolph-Sheppard Act months before that in January 2023 when
14 it excluded DES's proposal from the competitive range. The
15 subsequent exchange of letters after DES's proposal had already
16 been kicked out of the competitive range cannot somehow rectify
17 the Army's failure to start off by placing DES in the
18 competitive range, again conducting meaningful discussions.

19 Turning to the court's second question, which was, quote,
20 do, quote, meaningful discussions, close quote, necessarily
21 include the right for an SLA to revise its proposal one or more
22 times? The answer to that question is yes.

23 The Department of Education handbook provides guidance on
24 this point. It explicitly refers to clarification,
25 modification, or minor revision of the SLA's proposal. That's

1 Exhibit 18 at page 36. Indeed, revisions are even expressly
2 contemplated even under the FAR. FAR 15.306(d)(3), quote,
3 encourages, close quote, discussions of, quote, aspects of the
4 offeror's proposal, close quote, that could be, quote, altered.
5 In other words, the FAR says that there should be discussions
6 of aspects of the offeror's proposal which could be altered
7 which is simply another word for revised. It is difficult to
8 understand how discussions could be meaningful if they did not
9 allow revisions to the proposal.

10 As already noted, the South Carolina arbitration panel
11 envisioned meaningful discussions to include the SLA revising
12 its staffing level and addressing additional items missing from
13 its original proposal. Likewise, the Utah arbitration panel
14 found that the Utah SLA could have lowered its price and
15 otherwise revised its proposal if the Air Force had properly
16 conducted meaningful discussions. That's ECF 22-24 at 10.

17 While speaking of the FAR, I wanted to briefly address the
18 fact that FAR 15.306 and the arguments regarding the Army's
19 step two, I wanted to address that step two, that the Army's
20 main and really its only response on the second violation
21 alleged by DES in its complaint is that the Army was -- claims
22 that it was precluded from having discussions before setting
23 the competitive range.

24 Again, as I mentioned earlier, that misses the point. DES
25 is not saying that the Army had to have discussions before

1 setting the competitive range. Rather, the 1977 definition of
2 "competitive range", and the language in the Department of
3 Education's handbook requires the Army to first place DES's
4 proposal in the competitive range if it can be made acceptable
5 by discussions and then to hold those discussions. So
6 FAR 15.306 is simply no defense at all.

7 For the same reason, there's no conflict between the
8 Randolph-Sheppard Act and the five-step process outlined in the
9 solicitation. Step two of that process acknowledges that the
10 Army, quote, shall enter into discussion slash negotiations
11 with all offerors if proposals have been determined to be in
12 the competitive range, close quote. The entire point is that
13 the Army was required to place DES's proposal in the
14 competitive range in step one, at which point it could have
15 conducted the discussions with DES at step two as required by
16 -- as required by the Randolph-Sheppard Act and regulations.

17 The bottom line is simply that the Randolph-Sheppard Act
18 and the FAR are reconcilable. That said, if there were
19 conflicts between specific Randolph-Sheppard regulations and
20 the general FAR, the former would govern. There's extensive
21 case law and panel decisions on that point. Among other
22 authorities, that includes the Georgia federal court decision,
23 398 F. Supp. 3d at 1351, note seven, and Oklahoma arbitration
24 decision ECF 22-25 at 18.

25 I'd like to turn then to the court's fifth and final

1 question, which was, when examining the Army's findings with
2 respect to ADES's proposal, what level of review should the
3 court employ? And that question goes to the first preliminary
4 injunction factor, the likelihood of success on the first
5 alleged violation. But, again, the question, when examining
6 the Army's findings with respect to ADES's proposal, what level
7 of review should the court apply -- employ? Is it closer to de
8 novo or is there (unintelligible) owed to the Army's decision?
9 And the answer to that question is that no special deference is
10 owed to the Army's findings. Multiple arbitration panels have
11 recognized this, Oklahoma, 22-25 at 33; Missouri, 22-19 at 8;
12 Texas, 22-18 at 22 all make this specific point that given the
13 remedial purposes of the Randolph-Sheppard Act and given that
14 the arbitration panel is the trier of fact as opposed to
15 appellate tribunal, the standard closer to de novo is the
16 appropriate one.

17 The arbitration panel is set up by the Department of
18 Education and it acts as the alter ego of the Secretary of
19 Education. As the Oklahoma panel put it, quote, a statutory
20 interpretation that limits the panel's review and requires
21 deference to the contracting officer's determination under the
22 Randolph-Sheppard Act would be wholly inconsistent with the
23 statutory mandate requiring the Secretary of Education to
24 assure compliance with the Randolph-Sheppard Act's purposes and
25 objectives. That's 22-25 at 33.

1 In any event, under any standard of review, the Army's
2 decision was unreasonable. In the Army's response brief at 10,
3 it acknowledged that procurement decisions cannot stand if it
4 violates a regulation. And as we've explained, the Army's
5 decision did just that.

6 Moreover, at a minimum, the agency's decision must be
7 coherently explained and supported by substantial evidence and
8 the Army has failed to do either here. The Army has failed to
9 provide the most basic evidentiary support for its conclusions.
10 It hasn't provided any documents from the underlying
11 evaluation. It hasn't provided the source selection board doc
12 -- evaluation -- the source selection evaluation board
13 documents, including its technical evaluation. It hasn't
14 provided the independent government cost estimate of it which
15 outlines the Army's estimated staffing levels. It hasn't
16 provided an explanation of how the Army came up with those
17 staffing levels. It hasn't provided Mr. Froehlich's written
18 evaluation that he testified he had emailed to Mr. Vicory.
19 That's the day three transcript, page 15, lines 12 to 18. Nor
20 has it provided the other bidders' proposals, let alone the
21 Army's evaluation of those proposals.

22 Without any of those documents, essentially the Army's just
23 asking the court to take its word that DES's proposal was
24 understaffed and has provided no evidence of that
25 understaffing. That's the sort of evidence that the

1 arbitration panel will look at when making a more fulsome
2 determination. All the Army has provided the court is a series
3 of shifting --

4 Let me skip ahead, Your Honor, to save a little bit of
5 time.

6 The Army confuses the issue here by saying, that, quote,
7 past performance is a separate inquiry from technical capacity.
8 But here it's not quite that simple. Here, well, in the
9 typical case, past performance is at a different location, but
10 here DES was the incumbent. It provides services at the exact
11 same site, the exact same cafeterias. So its past performance
12 is the same as its current performance, it's the same as its
13 proposed future performance. There's a direct link between the
14 staffing that DES currently proposes -- that DES currently
15 provides and the staffing it proposed. In its technical
16 proposal --

17 THE COURT: Mr. Freeman, let me stop you for a minute.
18 Didn't the new solicitation actually require additional staff
19 than what was indicated in the past performance staff?

20 MR. FREEMAN: I don't believe so, Your Honor. The new
21 solicitation required staffing for exactly the same services
22 that are currently being provided. I think what Your Honor is
23 referring to is the two new possibilities that the solicitation
24 addressed or requested DES address, the one is all take-out
25 scenario and the other was brunch at Thunderbird. Each of

1 those actually requires less staffing than the proposal. The
2 idea of the all take-out is simply that you'd have a few, you
3 might have a few fewer staff if you don't have the same
4 clean-up, you simply prepare the food and it's taken out in
5 to-go boxes. Again, DES has done that before. DES provided
6 the pricing for that.

7 There's never been brunch at Thunderbird, but brunch is
8 simply instead of having three meals a day, you have two meals
9 a day so there's less staffing not more staffing.

10 So if I understand Your Honor's question, it's not that the
11 solicitation required additional staffing, the solicitation
12 asked for two hypothetical scenarios in which less staffing
13 would be required.

14 Again, the Army -- was within its right to ask for staffing
15 for those hypothetical scenarios. DES provided pricing that
16 was based on its staffing. It failed to provide those two
17 staffing matrices. I submit, Your Honor, that that is, you
18 know, if anything could have been, could have been clarified by
19 meaningful discussions, it was simply providing the two
20 staffing matrices that Ms. Mackey offered to provide in her
21 letter that provided the basis for the pricing in the -- that
22 was provided.

23 And one other point I want to make in relation to that is
24 that at least with regards to the take-out, the Army knew that
25 DES had provided during COVID, the Army had actual knowledge of

1 DES's actual staffing during COVID when DES did provide 100
2 percent take-out. So, again, the Army knew that even under the
3 current, the current proposal, the current staffing, DES was
4 capable of providing 100 percent take-out.

5 Remember, Your Honor, the Army also, Mr. Fuller testified,
6 as I recall, that among the evaluators that the Army had were
7 people who were actually from Fort Huachuca so they had
8 personal knowledge of that.

9 In addition, the Army claims that it was not permitted to
10 look at the current staffing in evaluating the proposed
11 staffing is simply wrong. That would have -- that point was
12 addressed by the Missouri arbitration panel which expressly
13 found that the Army had violated the Act by not considering a
14 company's history of performance in evaluating its technical
15 component. The Missouri panel stated, quote, the Army was well
16 aware of the facts of the Missouri SLA's subcontractor's
17 management approach and organization because the organization
18 had been the incumbent contractor at Fort Leonard Wood. That's
19 the location of (unintelligible) fifty years. That's ECF 22-10
20 at page 10.

21 Again, the Army's own evaluation documents, like the CeTARS
22 that were discussed at the hearing, armed (phonetic) the
23 adequacy of the DES's staffing. Even if those documents were
24 part of the past performance factor, they should have been
25 considered for the technical factor as well. Again, that's

1 simply a second -- all of this, Your Honor, goes to the DES's
2 first complaint. All of it goes to why we believe that DES's
3 proposal should have been, even under the Army's, proper
4 application of the Army standard, should have been included in
5 the competitive range. All of this is beside the point or a
6 supplement to the point that DES's proposal could have been
7 made to be within the competitive range through meaningful
8 discussions.

9 THE COURT: Mr. Freeman, I think the 45 minutes are
10 up. So unless there's something else that you need to say, I'm
11 going to let the government have their say.

12 MR. FREEMAN: I appreciate it, Your Honor. I've
13 actually, I've been running a clock and I'm not quite at
14 41 minutes if I could just have a few more minutes to address
15 irreparable harm, the second preliminary injunction.

16 THE COURT: Sure. Go ahead.

17 MR. FREEMAN: So there's undisputed testimony that
18 losing the Fort Huachuca contract would be catastrophic for
19 DES, for Mr. Weber, and for the other blind members of the
20 program.

21 THE COURT: And, Mr. Freeman, I'm going to have you
22 start over. For some reason, you're fading in and out. I
23 don't know why but --

24 MR. FREEMAN: Okay. Let me try to get a little bit
25 closer. Is that better, Your Honor?

1 THE COURT: Okay, yeah, that's better.

2 MR. FREEMAN: Thank you.

3 So with respect to the second preliminary injunction
4 factor, irreparable harm, the undisputed testimony is that
5 losing the Fort Huachuca contract will be catastrophic for DES,
6 for Mr. Weber, and for the other blind vendors in the program.
7 DES will lose roughly \$4 million out of its \$5.4 million
8 budget, almost 75 percent, just slightly over 75 percent.
9 Mr. Weber will lose his employment, his wife will lose hers.
10 Ms. Mackey testified eight members of the DES staff who
11 administer the program will be affected, and without adequate
12 funding and staffing, DES will not be able to support its 20
13 blind vendors throughout the state, won't be able to provide it
14 with the same training, equipment, or assistance with applying
15 for contracting opportunities, won't be able to provide them
16 with the same payments and benefits, including health insurance
17 and retirement benefits.

18 DES also currently provides supplemental cash payments up
19 to a fair minimum wage for blind vendors. Again, it will not
20 have the funds to do any of that which will have a
21 life-altering impact for vendors who operate small or blind
22 vending facilities like the cafeteria outside the Tucson
23 federal courthouse.

24 Again, monetary damages are not available due to sovereign
25 immunity. So losing the Fort Huachuca contract will be

1 devastating, the impact will be immediate, and will be
2 irreparable.

3 Finally, with respect to the balance of the harms, there's
4 simply no comparison between the evisceration of the State of
5 Arizona's Randolph-Sheppard program on the one hand and on the
6 other hand the Army continuing to receive high-quality service
7 at the current price which it has not claimed to be
8 unreasonable. Therefore, the balance tips overwhelmingly in
9 favor of DES and, given that, as I noted earlier, even though
10 DES meets the likelihood of success standard, it need only
11 show, quote, serious questions going to the merits under *hiQ*
12 *Labs*.

13 Finally, with respect to the public interest, that factor,
14 too, favors DES. The public interest is promoted by respecting
15 the Randolph-Sheppard Act and its blind vendors and by allowing
16 the Randolph-Sheppard arbitration process to play out. The
17 stakes in the case are extremely significant for DES. If DES
18 is permitted -- if the Army is permitted to kick DES out of
19 Fort Huachuca, even for a six-month period, it would be
20 disastrous.

21 We, therefore, respectfully ask that the court enter an
22 injunction, preserve the status quo until a panel renders its
23 decision on the merits, and avoid that disaster for DES. Thank
24 you.

25 THE COURT: Thank you, Mr. Freeman.

1 And for the government, Ms. Letzkus, are you arguing?

2 MS. LETZKUS: Yes, Your Honor.

3 THE COURT: Okay. Whenever you're ready.

4 MS. LETZKUS: Thank you, Your Honor.

5 It's plaintiff's burden here to prove all the elements that
6 are required to obtain an injunction, including likelihood of
7 success on the merits, likelihood of irreparable harm to
8 plaintiff, that the balance the equities tilts in favor of the
9 injunction, and that public interest would be served by the
10 issuance of the injunction. Plaintiffs have failed to meet its
11 burden here. Therefore, the court must deny the motion for
12 preliminary injunction.

13 As defendant has said from the beginning, this is a simple
14 case both from the law and the facts. And both the law and the
15 facts are in defendant's favor here.

16 First, the Randolph-Sheppard Act priority is not absolute.
17 Multiple federal courts have affirmed that proposition and
18 that's set out in defendant's briefing. The Randolph-Sheppard
19 Act gives the state licensing agency a priority over other
20 offerors only after the competitive range has been set and the
21 state licensing agency's acceptable proposal is included in the
22 competitive range. The regulation, 34 CFC 395.33, makes it
23 very clear in subsection (b) that the priority applies only if
24 the state licensing agency is first judged to be in the
25 competitive range.

1 In order to be included in the competitive range, the state
2 licensing agency's proposal must clearly demonstrate that it
3 meets the minimum requirements of the agency and of the
4 solicitation. The Randolph-Sheppard Act priority does not mean
5 that a state licensing agency can submit an unacceptable
6 proposal that does not meet the agency's minimum needs and does
7 not comply with the requirements of the solicitation and still
8 automatically be included in the competitive range.

9 Now, once the state licensing agency's proposal is included
10 in the competitive range, because it has submitted an
11 acceptable proposal, then the priority would apply, meaning it
12 almost certainly would get the contract. But under the
13 plaintiff's interpretation of the Randolph-Sheppard Act, the
14 agency would be required to in every instance include the state
15 licensing agency's proposal in a competitive range even if it's
16 unacceptable. Therefore, the state licensing agency would
17 always be entitled to the contract, no matter how unacceptable
18 its proposal may be. But again, Your Honor, federal courts
19 have said the Randolph-Sheppard Act priority is not absolute.

20 To try and get around this, plaintiff says that the agency
21 is required to engage in meaningful discussions with the state
22 licensing agency to enable it to make its proposal acceptable.
23 And when plaintiff references "meaningful discussions", it
24 clearly does not mean discussions for clarifications about how
25 its proposal as submitted can work to satisfy the Army's

1 minimum requirements. Plaintiff clearly interprets "meaningful
2 discussions" to mean that the contracting officer has to let
3 the state licensing agency heavily revise the proposal it
4 submits or even submit a completely new proposal.

5 It's important for the court to remember that there is no
6 meaningful discussion requirement in the Randolph-Sheppard Act
7 itself or in the (unintelligible) evaluation. The meaningful
8 discussion idea comes from the Department of Education handbook
9 that has guidelines for interpreting the Randolph-Sheppard Act
10 priority. Guidelines are simply that, guidelines. They
11 provide guidance. They do not provide requirements nor do they
12 have the effect of federal law. At any rate, the handbook's
13 guidance must be read as a whole and not just as selectively
14 quoted by plaintiffs.

15 In talking about how contracting officers evaluate state
16 licensing agency proposals, the handbook specifies, quote, a
17 proposal received from an SLA will be evaluated in the same
18 manner as for other offerors, close quote. The handbook also
19 provides that the meaningful discussion contemplated, quote,
20 would be consistent with an action involving a commercial
21 offeror under comparable circumstances, close quote.

22 So the handbook itself makes it clear that it's not
23 establishing special treatment for state licensing agencies
24 over all other offerors when it comes to the establishment of
25 the competitive range. Whatever the handbook means by

1 "meaningful discussions", it can't mean what plaintiff contends
2 it does, otherwise, it would not say to treat offerors equally.

3 Plaintiff's interpretation of the meaningful discussion
4 issue would create a two-tier system for offerors when it comes
5 to the competitive range. The Department of Education is only
6 authorized to promulgate regulations and guidance regarding the
7 implementation of the RSA. It does not have the right to
8 change or override the Federal Acquisition Regulation, FAR. As
9 such, in the plaintiff's interpretation, all nonstate licensing
10 agency offerors would be subject to requirements of FAR but
11 state licensing agencies would not.

12 You heard from the contracting officer, Mr. Vicory, that
13 FAR strictly limits discussion with offerors after they submit
14 their proposal but before the contracting officer sets the
15 competitive range. Per FAR, the contracting officer can talk
16 to the offerors and have them provide clarifications and answer
17 questions about the terms of their proposal after it's been
18 submitted. But the contracting officer is prohibited from
19 allowing offerors to revise or correct or change their
20 proposals. 48 CFR 15.306 when talking about exchanges between
21 offerors after receipt of proposals but before the setting of
22 the competitive range specifically says, quote, such
23 communications shall not be used to cure proposal deficiencies
24 or material omissions, materially alter the technical or craft
25 elements of the proposal, and/or otherwise revise the proposal,

1 close quote.

2 Under plaintiff's interpretation, state licensing agencies
3 would be permitted to revise the proposals as much as they want
4 or even scrap their proposals entirely and start all over again
5 with an entirely new proposal. But any other offeror would not
6 be permitted to revise or change its proposal. That would
7 directly contradict the handbook's instruction that state
8 licensing agency proposals should be evaluated in the same
9 manner as all other offerors.

10 And as Mr. Vicory testified, if the contracting officer
11 were to permit SLAs to submit revised, corrected, or new
12 proposals but not other offerors, he would be -- the
13 contracting officer would be opening himself or herself up to
14 litigation or to General Accountability Office protest from the
15 other vendors that submitted bids and were excluded from the
16 competitive range because he would not be treating all offerors
17 equally in evaluating the proposal. And Mr. Vicory also
18 testified that, based on his experience, he believed any such
19 protest would be upheld and the Army would be required to take
20 corrective action, eventually start the process over again. As
21 the contracting officer, Mr. Vicory was required by FAR and by
22 the solicitation to evaluate each offeror's proposal in the
23 same manner and that would be consistent with the handbook
24 citing as well.

25 Mr. Vicory gave plaintiff the opportunity to explain and

1 clarify how it believes its proposal as submitted met the
2 requirements of the solicitation and the Army's minimum
3 requirements. But he did not give plaintiffs a chance to
4 revise its proposal or come up with some new proposal. He did
5 not do so because that would violate FAR and, again, it
6 actually would be inconsistent with the handbook's repeated
7 guidance to treat all offerors the same and to treat state
8 licensing agencies just like any other commercial offeror.

9 Plaintiff here has never actually attempted to provide a
10 new or revised proposal. It clearly stands by its contention
11 that its proposal as submitted met the minimum requirements of
12 the Army and the solicitation. And even if it had attempted to
13 provide a new proposal, the contracting officer, Mr. Vicory,
14 would have violated the terms of the solicitation if he
15 considered a revised or new proposal from plaintiffs.

16 The solicitation clearly set out the five-step process that
17 explains the first step would be to determine if the proposal
18 submitted met the minimum needs of the Army and satisfied the
19 requirements of the solicitation and set the competitive range
20 based off proposals that were acceptable.

21 Mr. Freeman referenced testimony from Mr. Vicory that the
22 Army has sometimes had extensive discussions with offerors in
23 step two but plaintiff did not get to step two. Plaintiff
24 failed at step one. The second step was -- the second step did
25 provide that the contracting officer would engage in

1 discussions and negotiations but only with those offerors whose
2 proposals were acceptable and included in the competitive
3 range. The proposal plaintiff submitted was not acceptable,
4 therefore, it could not be included in the competitive range
5 and the contracting officer could not engage in discussions and
6 negotiations with plaintiff for relief past terms of the
7 solicitation. The handbook does not say that the state
8 licensing agency proposal must be considered within the
9 competitive range if it is technically inferior or deficient.

10 Here, the court heard from Mr. Vicory, the contracting
11 officer, and Mr. Froehlich, the Army's subject matter expert.
12 Both testified that there were multiple, serious deficiencies
13 with plaintiff's technical proposal. For example, the staffing
14 for cashiers was too lean to meet the Army's projected minimum
15 needs and posed too much of a risk of a back-up in getting
16 soldiers fed in a timely fashion so that they could get back to
17 their training and their mission.

18 There were also too few food sanitation workers to ensure
19 that the dining facilities and equipment were clean and the
20 food service was safe for the soldiers to eat. And there was
21 the trash can issue. Mr. Froehlich explained how plaintiff's
22 cross-training proposal would cause a serious problem with
23 accountability as well as other problems if, for instance, flow
24 rate.

25 Most egregiously, plaintiff's proposal did not even propose

1 any staffing at all for two bands of meals at the Thunderbird
2 facility which the solicitation clearly required them to
3 include in their proposal. When Mr. Freeman says, well, the
4 Army could have easily asked plaintiff to propose staffing for
5 the two bands of meals. The Army did ask all offerors,
6 including plaintiffs, to propose staffing for those bands of
7 meals as a required part of the solicitation.

8 Mr. Vicory, the contracting officer, went out of his way
9 here to get a second opinion from two Army subject matter
10 experts after the SSEB determined that plaintiff's proposal was
11 simply unacceptable. He didn't have to do that but he did so
12 because he wanted to make sure that the Army had made the right
13 decision.

14 The subject matter experts determined that plaintiff's
15 proposal was technically unacceptable and did not meet the
16 Army's minimum requirements. If it couldn't meet the Army's
17 minimum requirements, then it could never be technically
18 acceptable. As such, it could not be included in the
19 competitive range. It's important to remember than the Army's
20 minimum requirements were the bare minimum of what the Army
21 believes it needs from a national security standpoint. If a
22 vendor cannot satisfy the Army's minimum requirements, that may
23 negatively impact national security.

24 Plaintiff essentially argued here that the Army was
25 required to instruct plaintiff and is required to instruct

1 other SLAs, state licensing agencies, how to fix their
2 proposal, tell them exactly how many staff to propose and
3 exactly how to respond to the solicitation. And plaintiff
4 argues that state licensing agencies have to be included in the
5 competitive range no matter how many deficiencies and they
6 should always get the contract. That flies in the face of a
7 competitive selection process. Why even have other entities
8 submit offers if the SLA doesn't have to comply with the
9 solicitation?

10 Mr. Vicory testified the solicitation here was very clear
11 that unacceptable proposals would not be included in the
12 competitive range. He testified that if he had included
13 plaintiff's unacceptable proposal in the competitive range, he
14 would have violated the terms of the solicitation and been
15 subject to a General Accountability Office protest which would
16 have been sustained because he would not have treated all
17 offerors the same in evaluating proposals.

18 One of Your Honor's questions was what the standard of
19 review should be with respect to Mr. Vicory's conclusion backed
20 up by the SSEB and the subject matter experts that plaintiff's
21 proposal was unacceptable and therefore could not be included
22 in the competitive range.

23 Contracting office decisions are entitled to deference by
24 this court. By virtue of that deference, the court may
25 overturn the government's procurement decision only if the

1 procurement officer's decision lacked a rational basis. In
2 conducting the rational basis analysis, the court looks to
3 whether the contracting agency provided a coherent and
4 reasonable explanation of its exercise of discretion. And,
5 Your Honor, this deference discussion is found in annotated
6 *Impresa Consturzioni Domenico Garufi v United States* -- sorry
7 for my terrible Italian. That is 238 F.3d 1324. It's from the
8 Federal Circuit in 2001.

9 To overcome the deference that is afforded the contracting
10 officer's decision, plaintiff here bears the burden of showing
11 that the award decision has no rational basis but Mr. Vicory
12 and Mr. Froehlich clearly established several rational bases
13 for finding plaintiff's proposal to be technically unacceptable
14 and therefore not included in the competitive range.

15 Plaintiff cites multiple arbitration panel decisions, which
16 arbitration panel failed to apply the required deferential
17 level of review. As explained in our opening, Your Honor, the
18 -- all of the arbitration panel decisions on which plaintiff
19 relied are factually distinguishable. Moreover, the court is
20 not bound by the arbitration panels' decisions. They are not
21 binding nor are they persuasive.

22 THE COURT: Ms. Letzkus, let me ask you, I may not be
23 bound by them but in determining whether or not ADES has a
24 likelihood of success before the arbitration panel, aren't
25 those decisions meaningful for the court to consider and

1 shouldn't the court consider those decisions?

2 MS. LETZKUS: Well, they're not meaningful or
3 persuasive, Your Honor, because as explained, they're all
4 factually distinct. Only one of them involves a SLA being not
5 included in the competitive range due to technical deficiencies
6 of the proposal and in that case there was direct evidence that
7 the contracting officer had a personal bias against the blind
8 vendor. So defendant would suggest, Your Honor, that these
9 arbitration panel decisions are not entitled to any persuasive
10 value.

11 THE COURT: Has the government provided specific
12 arbitration panels' decisions that would be on point for the
13 issues that we have here?

14 MS. LETZKUS: No, Your Honor. What we relied on was
15 plaintiff's extensive discussion of arbitration panel decisions
16 and how they were distinguishable from our situation.

17 THE COURT: Okay. Go ahead.

18 MS. LETZKUS: Well, the arbitration panel decisions
19 are not persuasive and their failure to apply the deferential
20 standard should be rejected here. Federal courts have made it
21 clear that the traditional deference does apply in
22 Randolph-Sheppard Act disputes and those cases are cited in
23 defendant's brief.

24 Even arbitration panels who (unintelligible) the
25 traditional deference standards have never said that de novo

1 review applies unless there's substantial weight afforded the
2 contracting officer's decision. The Army knows its projected
3 future needs better than anybody and Mr. Vicory went out of his
4 way to choose subject matter experts to take an independent
5 second look at plaintiff's proposal after the SSEB had already
6 determined that it didn't satisfy the Army's minimum needs.

7 The court must afford discretion to the Army's decision as
8 to what its minimum needs are and whether plaintiff has or can
9 meet them. Otherwise, the state licensing agency would get to
10 dictate to the Army what the Army's needs are. That would be
11 an absurd result with far-reaching consequences for national
12 security.

13 The only person from plaintiff's side who was involved with
14 a proposal and testified about it was Mr. Weber. Even
15 Mr. Weber conceded that he does not believe he knows better
16 than the Army what the Army's needs are over the next five
17 years. So the court should defer to Mr. Vicory who has the
18 benefit of not only the SSEB evaluation but also the
19 independent SMEs' evaluation.

20 Plaintiff has (unintelligible) a significant time and
21 opportunity of establishing that it had satisfactorily under
22 the existing contract. The past performance issue is simply a
23 red herring. Past performance is just one independent factor
24 to be considered, not the sole factor. And there's no dispute
25 that plaintiff's past performance was considered by the Army

1 and was deemed acceptable. Nor in the solicitation does it
2 require the Army to count past performance twice by using it to
3 evaluate the technical capability factor or the fact and
4 subfactor in addition to the separate past performance factor.
5 Your Honor asked Mr. Weber where in the solicitation it
6 provides that past performance is to be taken into account when
7 evaluating the technical capability factor and he was unable to
8 point the court to any such provision.

9 Mr. Vicory testified the solicitation did contemplate the
10 sort of double counting of past performance. And Mr. Froehlich
11 testified the Army has decided that its projected needs over
12 the next five years are different from five years ago when
13 plaintiff was awarded the contract.

14 As (unintelligible) the world has changed recently,
15 especially with the war in Ukraine, the Army has to anticipate
16 and adjust potential changes to the number and types of
17 soldiers that will need to be sent. It's key (unintelligible)
18 to remember that the RSA priority is not absolute and does not
19 require that the government contracts with a vendor whose
20 proposal is technically inferior and does not meet the minimum
21 requirements of the solicitation. And several courts have
22 acknowledged this fact, including the Tenth Circuit in *Kansas*
23 *versus North America*, which is 874 F.3d 1226, the Federal
24 Circuit in *Kentucky versus United States*, 424 F.3d 1222, the
25 Fourth Circuit in *NISH versus Cohen*, 274 (sic) F.3d 197, and

1 the Court of Federal Claims in *Commonwealth of Kentucky*
2 *Education Cabinet, Department for the Blind versus United*
3 *States*, which is 62 Fed. Cl 445, and *Mississippi Department of*
4 *Rehabilitation Services versus the United States* which is
5 61 Fed. Cl 20.

6 And this technical proposal was deficient for multiple
7 reasons. Therefore, it could not be considered in the
8 competitive range and the RSA priority does not kick in here.
9 As such, plaintiff has not established that the defendant
10 violated the RSA in not including it in the competitive range
11 and plaintiff has not then satisfied its burden to prove it's
12 likely to succeed on the merits.

13 And with regards to the irreparable harm factor, courts
14 have repeatedly said that money losses are not generally
15 considered irreparable harm. Mr. Weber testified he will lose
16 his (unintelligible) if he's not awarded the contract, despite
17 the proposal being unacceptable. But ADES's witness,
18 Ms. Mackey, testified that ADES has over 30 locations in
19 Arizona so it stands to reason that ADES could find Mr. Weber a
20 job at one of those other facilities.

21 Mr. Freeman here has repeatedly pointed out that ADES
22 relies heavily on its cut of the proceeds from the Fort
23 Huachuca contract to fund its operation. It's unfortunate then
24 that ADES did not given Mr. Weber more assistance in crafting
25 the proposal or did not itself craft the proposal in such a way

1 as to meet the minimum requirements of the Army and the terms
2 of the solicitation.

3 Federal courts have made it clear that the
4 Randolph-Sheppard Act does not give state licensing agencies or
5 blind vendors an unqualified right to a contract.

6 Plaintiff has also not met its burden to prove that the
7 balance of the equities tilts in favor of an injunction here.
8 Again, what -- under the plaintiff's interpretation of the
9 Randolph-Sheppard Act, the competitive selection process for
10 contracting would be completely ignored and discarded.

11 The court has heard testimony it took a long time to get a
12 final decision in an RSA arbitration and then there are the
13 appeals. And during that time, the Army will be forced to
14 continue the contract with plaintiff by a series of bridge
15 contracts even though the Army has decided plaintiff can't
16 satisfy its minimum requirements. And the court heard from
17 Mr. Vicory that such bridge contracts are disfavored for
18 multiple reasons.

19 It would be inequitable to allow plaintiffs to use the
20 preliminary injunction process to force the Army to continue to
21 contract with plaintiff indefinitely even though it can't meet
22 the Army's minimum needs. We are talking here about soldiers
23 who have volunteered to serve their country. They deserve to
24 be fed in a safe and timely fashion so they can continue their
25 training and serve their mission.

1 THE COURT: Hasn't Mr. Weber done that, though, for
2 the last 10 years?

3 MS. LETZKUS: Well, as Mr. Froehlich testified, the
4 Army has determined that its needs are projected to be
5 different over the next five years so plaintiff's current
6 performance does not necessarily impact or demonstrate that it
7 will be able to meet the Army's projected requirements over the
8 next several years.

9 THE COURT: And if I remember correctly, didn't
10 Mr. Vicory also indicate that under a current contract, if
11 additional staffing or meals needed to be done, there was a
12 mechanism to do that within an existing contract; is that
13 correct?

14 MS. LETZKUS: Yes, Your Honor, he did testify to that.
15 I believe he also testified that depending on the changes
16 required that could be considered a new solici -- something
17 that required a new solicitation that would be subject to
18 protest by other potential vendors.

19 THE COURT: Let me ask one other question and then
20 I'll let you continue with your other arguments. But one of
21 the questions I have is should the court find not necessarily
22 that the plaintiff is likely to succeed on the merits but at
23 least serious questions going to the merits, what's the Army's
24 argument with respect to the balancing of the hardships and how
25 that does not tip sharply in the plaintiff's favor?

1 MS. LETZKUS: Well, then, the balance doesn't shift
2 sharply in plaintiff's favor here because what plaintiff wants
3 the court to do by using the preliminary injunction process is
4 to do an end run around the competitive selection process which
5 is -- has been put in place to conserve taxpayers' money and to
6 get efficient, effective services. If -- it's not the Army's
7 obligation to prove that it will be harmed but the Army has,
8 Mr. Vicory has testified that the -- excuse me. Mr. Froehlich
9 has testified that the Army's needs are projected to change
10 over the next few years and therefore -- and that plaintiff's
11 proposal does not meet those minimum needs so the Army should
12 not be forced to continue the contract with plaintiff
13 indefinitely pending the results of an arbitration panel and
14 any appeals of that decision because it would simply be -- it
15 would simply enable the plaintiff to do an end run around the
16 competitive selection process.

17 And that also goes to the public interest factor, Your
18 Honor. The public interest is served by enforcing the
19 competitive selection process, not by rewarding offerors who
20 are trying to use the preliminary injunction process to force
21 the Army to continue to accept services that it has determined
22 don't meet the minimum needs.

23 So, Your Honor, the FAR was created in order to conduct
24 government procurement that (unintelligible) by taxpayers with
25 integrity, fairness, and openness and ensure a fair contracting

1 process where all offerors are treated with fairness and equity
2 based on their ability to meet the minimum requirements of the
3 agency, and the contracting officer here correctly applied FAR
4 in finding that plaintiff's proposal didn't meet the Army's
5 minimum requirements and was therefore unacceptable and could
6 not be included in the competitive range. Allowing plaintiffs
7 to disregard the Army's minimum requirements would set a bad
8 precedent, would not serve the needs of our soldiers, and would
9 negatively affect the Army's mission.

10 So, in conclusion, Your Honor, plaintiff has simply not met
11 its burden to demonstrate that it's entitled to the
12 extraordinary remedy of a preliminary injunction here and,
13 therefore, defendant respectfully requests that the court deny
14 plaintiff's motion. And I'd be happy to answer any additional
15 questions that Your Honor might have.

16 THE COURT: I don't have any other questions. Thank
17 you, Ms. Letzkus.

18 MS. LETZKUS: Thank you, Your Honor.

19 THE COURT: And, Mr. Freeman, any rebuttal?

20 MR. FREEMAN: Yes, Your Honor.

21 Several points, I'll try to address them basically in the
22 order that the Army raised them. I'd like to start with
23 something the Army failed entirely to address which is the fact
24 that the requirement to place a proposal in the competitive
25 range if it might be made acceptable through meaningful

1 discussions doesn't come from the DOE handbook, it comes from
2 the meaning of "competitive range" the way competitive range
3 was applied in 1977 when the Randolph-Sheppard Act and its
4 regulations were adopted. So that's as a matter of statutory
5 interpretation by the Randolph-Sheppard Act and its regulations
6 require that -- excuse me. I'm sorry.

7 THE COURT: That's okay.

8 MR. FREEMAN: -- require the SLA's proposal to be
9 placed into a competitive range if it can be made acceptable
10 from meaningful discussions.

11 It's the Army, not the Department of Education, that
12 changed, that tried to change that. The -- again, the Army has
13 the right to change it for other offerors but not for state
14 licensing agencies. The Army's counsel referred to the
15 handbook's reference to evaluating in the same manner other
16 offerors. Again, that's because that's in 1977, when the
17 regulations were adopted, everybody was evaluated that way.
18 And the SLA's proposal was therefore evaluated in the same
19 manner.

20 Now that the Department of Education has changed -- I'm
21 sorry, now that the Department of Defense has changed the way
22 it sets the competitive range, it can still evaluate everyone
23 in the same manner but the Randolph-Sheppard Act and its
24 regulations require one additional step with respect to the
25 SLA, which is to continue considering the SLA's -- whether the

1 SLA's proposal can be made to be acceptable through meaningful
2 discussions. That was the requirement in 1977 under the
3 Randolph-Sheppard Act and regulations, that's still the
4 requirement today.

5 And the Army argues that the Department of Education can't
6 create a two-tier system and can't override FAR. But, in fact,
7 there is a -- there's a like two-tier system that is required
8 by the Randolph-Sheppard Act. That's the purpose of the
9 Randolph-Sheppard Act. That, as I said before, and I don't
10 think the Army disputes if the SLA is in the competitive range
11 and its proposal can be made acceptable, then it is supposed
12 to, Congress directed that it receive its award.

13 There are certainly some situations where the SLA's
14 proposal cannot be made acceptable and it won't get it. But
15 the priority, as Congress instructed and the Department of
16 Education implemented, is a priority for the SLA to get this
17 because Congress wants blind vendors to have this
18 entrepreneurial opportunity.

19 That point, Your Honor, I want to again fly was directly
20 addressed by the Georgia District Court, not by an arbitration
21 panel, at 398 F.Supp. 3d at 1351, note seven, which recognized
22 that the Randolph-Sheppard Act, quote, might require a
23 different result than the general FAR regulations would
24 otherwise with certain government contracts. And then again
25 the Oklahoma arbitration decision found the same thing at

1 page 18.

2 With respect, by the way, to the import of the arbitration
3 decisions, we're not claiming that every one of them has
4 exactly the same facts, but each and every one of the
5 propositions that we cite those arbitrations for is fully
6 appropriate and fully applicable here. I do think that the
7 government, the Army slightly mischaracterized some of those.

8 First of all, the personal bias case that counsel referred
9 to is the Oklahoma case. There are, in fact, two of the
10 arbitration panels that we reference which were addressing
11 situations in which the federal property manager had found the
12 SLA's bid to be technically unacceptable. That's both the
13 South Carolina decision and the Missouri decision are, I would
14 submit, are very close on the facts as well as on the law
15 that's applicable here.

16 On the other hand, some of the cases that the Army is
17 citing are simply not Randolph-Sheppard cases but the
18 (unintelligible) not a Randolph-Sheppard case. The cases sort
19 of generally alludes to where money losses are not considered
20 irreparable harm don't apply here because in those cases
21 monetary damages are available, whereas, here it's undisputed
22 that because of sovereign immunity, monetary damages would not
23 be available to ADES or Mr. Weber at the end of this case. So,
24 again, we cite that both in our brief and again in our reply.

25 With respect again, to -- so I find that the Georgia

1 District Court case, there's also the Fourth Circuit's decision
2 in *US versus Cohen*, 427 F.3d at 202, which specifically
3 addressed the fact that, quote, the Department of Defense was
4 wrong in implementation of the Randolph-Sheppard Act. It was
5 primarily to follow the decisions of the Department of
6 Education. It is the Department of Education's administration
7 of the Randolph-Sheppard Act that is authorized by statute that
8 is entitled to deference. Again, the deference goes to the
9 Department of Education, not to the Army, certainly not to the
10 contracting officer. It's not -- Mr. Vicory doesn't get to
11 interpret the Randolph-Sheppard Act, only the Department of
12 Education does.

13 Again, despite Mr. Vicory's, what I submit are overblown
14 fears, if the -- when the Randolph-Sheppard arbitration panel
15 says that he should have included that SLA's proposal in the
16 competitive range and he complies with that direction, there is
17 simply no risk of some sort of GAO or other challenge or
18 nobody's going to jail. That is simply the law. The law is
19 that the Randolph-Sheppard Act does in this particular instance
20 override the -- override the FAR.

21 With respect to the cash fund which the government
22 mentioned, that was not a ground for exclusion. I submit that
23 that wasn't actually a real concern. The cash fund has never
24 been an issue in 20 years of operation and, again, to the
25 extent that there was desire for some sort of different

1 approach, that's precisely the sort of meaningful discussion
2 that could be held.

3 Mr. Vicory agreed in day two transcript, page 50, at lines
4 9 through 16, that a debriefing letter, quote, set out all the
5 grounds for the Army's disqualification of DES's proposal, and
6 he conceded that the debriefing letter did not mention the cash
7 fund and really that should end the inquiry.

8 With respect to the alleged impact on national security, we
9 submit that there is simply no effect on national security for
10 Mr. Weber continuing providing food service for the next six
11 months or even longer if there might be an appeal. Again, we
12 could come back to the court if there is some concern about the
13 length of time.

14 But Mr. Weber has, is, and will continue to provide
15 high-quality service to the Army and its soldiers during the
16 pendency of any preliminary injunction while the arbitration
17 panel is playing out. Again, we cited to the court the length
18 of time of the recent arbitration panel which has been less
19 than six months. So we anticipate that the hearing in this
20 case will be sometime early next year.

21 Again, the Army has simply not identified any appreciable
22 harm that it will suffer, let alone harm that comes close to
23 what DES will suffer. We're not talking about over the next
24 five years, we're talking about over the next six months, maybe
25 a little bit longer, but the -- for the panel to decide,

1 hopefully, for the Army then to implement the panel's decision.
2 That, that's the time period where the harm is being balanced,
3 that's the time period where, in the absence of a preliminary
4 injunction, ADES will completely lose this income, be
5 devastated, Mr. Weber will lose his income. Moving him to
6 another facility is not an adequate substitute for that, and
7 the Army has, I believe, conceded, certainly has not disputed,
8 that there is no opportunity to recover that income and
9 therefore that this harm is indeed irreparable.

10 If I might just have one moment to consult with co-counsel,
11 Your Honor, I think I'm almost finished.

12 THE COURT: Yes, go ahead.

13 MR. FREEMAN: Just a couple of last points, Your
14 Honor. Again, where I left off that the Army will continue to
15 receive the same level of staffing tomorrow under preliminary
16 injunction that it's receiving today under the prior contract
17 and on which the Army has consistently given high, favorable
18 evaluations to.

19 With respect to the court's question regarding if
20 additional staffing is needed, could that be done, the answer
21 is absolutely yes. The Army simply does a contract
22 modification. A contract modification would be totally in line
23 with the current contract. There's no scenario that the Army
24 has offered that would technically require a new solicitation
25 while the arbitration is pending.

1 With respect, finally, to the -- the underlying question is
2 simply, contrary to the Army's argument, the Army does override
3 FAR to the extent that the two are in conflict. I'm sorry, the
4 Randolph-Sheppard Act and the Randolph-Sheppard regulations
5 override FAR to the extent they are in conflict. Again, we
6 submit that they can be reconciled. We submit that if the
7 Army, by following the Randolph-Sheppard Act, can place this
8 into the competitive range and then conduct meaningful
9 discussions in step two, and that the FAR allows that, but to
10 the extent that it does not or, again, it is the
11 Randolph-Sheppard Act that specifically applies to this
12 specific situation and it is the Department of Education and
13 its regulations that governs here.

14 At the least, there are serious questions with respect to
15 whether the arbitration panel will reach that conclusion.
16 Again, in light of the overwhelming balance of the hardships,
17 and the overwhelming hardship that DES will suffer compared to
18 the simple continuation of the satisfactory status quo that the
19 Army will, I don't want to say suffer, but that the Army will
20 enjoy, all that the court need find is that there's a serious
21 question as to whether the SLA's bid should have been placed in
22 the competitive range because it could be -- because it could
23 then have been made acceptable through meaningful discussions.

24 Finally, Your Honor, under the preliminary injunction
25 rules, if there is some sort of changed circumstance while the

1 preliminary injunction is pending, we could always return to
2 the court. I highly doubt that that would be the case but the
3 preliminary injunction is just that, and, again, if there are
4 changed circumstances, we could return. Thank you.

5 THE COURT: Thank you. The court will take the matter
6 under advisement. I do have a question, I guess, for either of
7 the parties regarding this. Is there any additional
8 information regarding the status of the arbitration compared to
9 a couple of weeks ago?

10 MR. FREEMAN: A slight one, Your Honor. So I think
11 when we first informed the court, both sides had appointed
12 their arbitrators and the way the process works, the -- those
13 two arbitrators then choose a chairperson.

14 Actually, while we were all in Tucson, the Department of
15 Education provided the parties two choices with a list of
16 potential chairpeople. Unfortunately, the Army's arbitrator
17 has left the country until September 8th. But I am assured
18 that promptly upon his return the two arbitrators will consult
19 and choose a chairperson and the arbitration will move forward.
20 Again, that will still be on a more expedited schedule that
21 resulted in the six-month, a hearing at the end of six months
22 in what was Fort Lee, is now Fort Gregg-Adams arbitration in
23 Virginia.

24 THE COURT: Okay. And, Ms. Letzkus, any additional
25 information regarding the status of the arbitration?

1 MS. LETZKUS: No, Your Honor.

2 THE COURT: Okay. At this time, I'll go ahead and
3 take it under advisement and a written order will follow.
4 Thank you all very much. I appreciate it.

5 MR. FREEMAN: Thank you, Your Honor.

6 MS. LETZKUS: Thank you, Your Honor.

7 (The matter was concluded at 3:09 p.m.)

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C E R T I F I C A T E

I, Cindy J. Shearman, court-approved transcriber,
certify that the foregoing is a correct transcript from the
official digital sound recording of the proceedings in the
above-entitled matter to the best of my ability.

s/Cindy J. Shearman
Cindy J. Shearman, RDR, CRR, CRC

October 12, 2023
Date